

BRB No. 11-0812 BLA

BUENA V. PHILLIPS)	
(Widow of GEORGE W. PHILLIPS))	
)	
Claimant-Petitioner)	
)	
v.)	
)	
KENTLAND-ELKHORN COAL)	DATE ISSUED: 08/13/2012
CORPORATION)	
)	
Employer-Respondent)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Decision and Order on Remand Denial of Benefits of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Dennis James Keenan (Hinkle & Keenan P.S.C.), South Williamson, Kentucky, for claimant.

James M. Kennedy (Baird and Baird, P.S.C.), Pikeville, Kentucky, for employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order on Remand Denial of Benefits (2009-BLA-05110) of Administrative Law Judge Daniel F. Solomon, with respect to a survivor's claim filed on January 14, 2008, pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124

Stat. 119 (2010)(to be codified at 30 U.S.C. §§921(c)(4) and 932(l))(the Act).¹ This case is before the Board for a second time. In its previous Decision and Order, the Board affirmed the administrative law judge's finding that the evidence was insufficient to establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c), but vacated the denial of benefits and remanded the case for the administrative law judge to consider whether the rebuttable presumption of total disability due to pneumoconiosis, set forth in amended Section 411(c)(4), 30 U.S.C. §921(c)(4), is applicable.² *Phillips v. Kentland-Elkhorn Coal Corp.*, BRB No. 10-0243 BLA (Nov. 29, 2010)(unpub.).

On remand, the administrative law judge determined that claimant did not establish that the miner had a totally disabling respiratory impairment at 20 C.F.R. §718.204(b)(2) and, therefore, was not entitled to the presumption at amended Section 411(c)(4). Based on the Board's previous affirmance of the administrative law judge's finding that claimant did not establish death causation at 20 C.F.R. §718.205(c), an essential element of entitlement, the administrative law judge denied benefits.

On appeal, claimant argues that the administrative law judge erred in finding that she did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv) and, therefore, erred in finding that she did not invoke the amended Section 411(c)(4) presumption. Employer responds, urging an affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief in this appeal.³

¹ Claimant is the widow of the miner, George W. Phillips, who died on December 18, 2007. Director's Exhibit 9.

² Relevant to this survivor's claim, Section 411(c)(4) provides that, if a miner had at least fifteen years of underground coal mine employment, or surface mine employment in conditions substantially similar to those of an underground mine, and the evidence establishes that the miner had a totally disabling respiratory impairment, there is a rebuttable presumption that the miner's death was due to pneumoconiosis. 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(l)).

³ We affirm, as unchallenged on appeal, the administrative law judge's crediting of the miner with twenty-two years of coal mine employment and his determination that claimant was unable to establish that the miner had a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law.⁴ 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge determined that claimant did not provide a report in which the physician made the necessary comparison between the exertional requirements of the miner's usual coal mine work and his functional capabilities. Decision and Order on Remand at 4. The administrative law judge further stated that, even assuming that the miner engaged in heavy labor and that his recent physical examinations revealed increased expiratory effort, "there is no evidence that it would preclude work." *Id.*

Claimant contends that the administrative law judge did not properly weigh the evidence relevant to total disability, as "the record is replete with documentation that [the miner] had a totally disabling breathing impairment." Claimant's Brief at 4. As proof, claimant cites the identification on the death certificate of coal workers' pneumoconiosis as a significant condition contributing to the miner's death, medical records reflecting the miner's breathing medications, his complaints of shortness of breath, and diagnoses of coal workers' pneumoconiosis and chronic obstructive pulmonary disease. Claimant maintains, "[w]hen the Board considers the medical evidence and gleans from it the problems [the miner] had been having due to his breathing[,] it is clear that he had a totally disabling lung condition" Claimant's Brief at 5.

Claimant's contentions are without merit. Although claimant identifies evidence suggesting that the miner may have had breathing problems or was diagnosed with a respiratory impairment or coal workers' pneumoconiosis, claimant does not, as the administrative law judge determined, identify medical opinion evidence relevant to 20 C.F.R. §718.204(b)(2)(iv) that is sufficient to establish that the miner had a totally disabling respiratory or pulmonary impairment. *See Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989). In *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000), the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, held that if a physician diagnoses a respiratory impairment, the administrative law judge must evaluate whether the physician considered the exertional requirements of the miner's previous coal mine

⁴ The record reflects that the miner's coal mine employment was in Kentucky. Director's Exhibit 4; Hearing Transcript at 13. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(en banc).

employment in finding that the miner was totally disabled. The administrative law judge's determination that claimant did not provide such an opinion is supported by substantial evidence, as Drs. Vuskovich and Rosenberg stated that the miner did not suffer from a permanent and totally disabling respiratory or pulmonary impairment.⁵ See *Cornett*, 227 F.3d at 578, 22 BLR at 2-124; *Crisp*, 866 F.2d at 185, 12 BLR at 2-129; Decision and Order on Remand at 4; Employer's Exhibits 1-3. Therefore, we affirm the administrative law judge's determination that claimant did not establish that the miner had a totally disabling respiratory impairment at 20 C.F.R. §718.204(b)(2) and, therefore, did not invoke the presumption at amended Section 411(c)(4).

Regarding whether claimant can establish entitlement to survivor's benefits without benefit of the amended Section 411(c)(4) presumption, claimant has raised no challenge to our prior affirmance of the administrative law judge's finding that claimant did not establish death causation at 20 C.F.R. §718.205(c). *Phillips*, BRB No. 10-0243 BLA, slip op. at 6. Thus, that finding is now the law of the case. See *Braenovich v. Cannelton Industries, Inc.*, 22 BLR 1-236, 1-246 (2003); *Troup v. Reading Anthracite Coal Co.*, 22 BLR 1-11 (1999) (en banc). We must affirm the denial of benefits, therefore, as claimant has failed to establish an essential element of entitlement.⁶ See *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987).

⁵ Dr. Vuskovich determined, based upon a review of the miner's medical records, that the miner's "only known disabling respiratory impairment was the pneumonia that killed him." Employer's Exhibit 3. Dr. Rosenberg also conducted a record review and found that there was no evidence that the miner had any pulmonary impairment. Employer's Exhibits 1, 2. The miner's treatment records contain diagnoses of pneumoconiosis and obstructive lung disease, but there is no opinion indicating the extent, if any, to which the miner was disabled. Director's Exhibit 13.

⁶ In order to establish entitlement to survivor's benefits under 20 C.F.R. Part 718, claimant was required to prove that the miner had pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the miner's death was due to pneumoconiosis. 20 C.F.R. §§718.1, 718.202, 718.203, 718.205. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989).

Accordingly, the administrative law judge's Decision and Order on Remand Denial of Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge